CASE NO. 90-1551

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK AND FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

I.

Does this court lack jurisdiction?

II.

Was the doctrine of mootness correctly applied by the lower courts to the facts of this case?

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INTRODUCTION

This Petition marks the ninth time that these Petitioners have sought certiorari from this Court. The Petitioners have also previously filed a petition for writ of mandamus. With the exception of one petition that is currently pending before the Court,[1] this Court has denied all of the prior petitions.[2]

Like the petitions that have preceded it, there is nothing unique about this petition. On the contrary, the Petitioners have presented the same frivolous arguments to the bankruptcy court, the district court, and the United States Court of Appeals for the Eleventh Circuit. This Petition is particularly frivolous because it is a blatant attempt, notwithstanding a thinly-veiled attempt to appear otherwise, to reargue the identical issues raised in a prior petition which these Petitioners filed and from which this Court denied certiorari.[3] Moreover, this is not the first time that these Petitioners have sought to reargue these issues despite this Court's prior denial of certiorari.[4] It is thus apparent that the Petitioners have the same disregard for the decisions of this Court as they

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[1] Case No. 90-1361. References to the Petitioners' Appendix will be denoted as "___ a," and references to the Appendix to this response are denoted "Bank's App. ___."

[2] Case Nos. 90-761, 90-676, 89-917, 89-864, 89-708, 88-80, 87-1989 and 87-1988.

[3] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 1046 (1988) (Case No. 87-1988).

[4] *In re Holywell Corp.*, 901 F. 2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991) (Case No. 90-676).

have demonstrated time and time again in the courts below. The fact that new counsel are involved (the fifth firm of attorneys since the cases began) does not excuse that disregard.

STATEMENT OF THE CASE

The Petitioners' statement is incomplete and contains numerous misstatements which need to be clarified or corrected.

The five affiliated debtors – Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") all filed voluntary petitions in bankruptcy on August 22, 1984.[5] The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[6] Gould owned 100% of the stock of debtor, Holywell and also served as president and director of Holywell. In turn, Holywell owned 100% of the stock of debtor MCC, and Gould served as president and director of MCC. Gould and MCC were the sole general partners of debtor Chopin and of debtor MCLP. All five debtors were involved in developing the Miami Center

[5] For purposes of this Response, the Petitioners will also be referred to as the "debtors."

[6] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

Project, an office building and hotel complex in downtown Miami.

The Bank of New York (the "Bank")[7] was the lead construction lender for the Miami Center Project.

Commencing in March of 1980, the Bank advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents. The loans were in default as of February 1, 1984, and the Bank commenced a state court foreclosure action in July of

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[7] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank - The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:
BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

1984. The debtors filed voluntary Chapter 11 proceedings on August 22, 1984.

The relevant proceedings which led to this Petition are:

1. The Liquidating Trustee commenced the adversary proceeding below to resolve long-standing disputes regarding the October 10, 1985 sale of Miami Center. Under the confirmed plan of reorganization (the "Plan"), the land, improvements, furniture, fixtures, equipment, and other property comprising the Miami Center Project were sold to the Bank's designee for $255.6 million.

2. Although specifically noting that the Bank's Plan did not provide for the payment of taxes (Petition, pp. 5-7), the debtors fail to point out that the reorganization plans which they proposed and which were overwhelmingly rejected also did not provide for the payment of taxes.[8]

3. The contract for sale attached to the Plan (Exhibit "A" attached to C.P. No. 479)[9] provided for various prorations and adjustments that could affect the cash to

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[8] Despite the fact that the tax issue is the subject of yet another petition currently pending before this Court (Case No. 90-1361) and despite the fact that this issue is not relevant to this Petition, the debtors argue at length the issue as to the payment of taxes. Petition, pp. 5-7, 13, 16, and 26-29. The debtors even devote one full section of their Petition to this issue. Petition, pp. 27-29. These arguments by the debtors are an improper attempt to get another bite at the apple.

[9] References to the record in the bankruptcy court are by bankruptcy court paper number after the abbreviation "C.P. No."

close. At closing on October 10, 1985, the Liquidating Trustee and the purchaser were unable to agree on a number of adjustments, and they agreed to finalize the adjustments after closing.

4. The debtors suggest that they had no voice as to the closing adjustments. Not so. The debtors, the Liquidating Trustee, and the Bank identified over 35 disputed adjustments.[10] All three interested groups prepared proposed closing statements reflecting their position on the adjustment items. By the Fall of 1987, when the Liquidating Trustee filed the adversary proceeding, many of the adjustments had been settled. One adjustment that was not settled was the debtors' claim, rejected by both the Liquidating Trustee and the Bank, that the Bank owed a "credit" in excess of $27 million for post-petition interest. Although the Plan provided clearly that such interest *was* to be allowed as a credit, and although the district court's prior opinion demonstrated clearly that the Bank was not "undersecured," the debtors refused to withdraw the claim.

5. The issue was presented to the bankruptcy court as Count III of the Complaint. The adversary proceeding was tried on December 8, 1987, and the bankruptcy court entered judgment in favor of the Bank on Count III by Order entered December 18, 1987. 11a.

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[10] The adjustment items included property tax prorations, credits for inventories of food and construction materials, credits for cash on hand in the hotel, and so forth.

6. Prior to the bankruptcy court's determination as to Count III, the extent, validity, and priority of the Bank's mortgage lien had been tried in another adversary proceeding on March 14, 1985. By judgment entered March 20, 1985, the bankruptcy court determined that the Bank's lien was valid and fixed the lien at over $234 million plus interest thereafter. *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).[11]

7. The Bank's collateral included:

(a) The Miami Center Project, which the bankruptcy court determined was worth $255.6 million. The district court affirmed that finding in 1986. *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340, 352 (S.D. Fla. 1986).

(b) Cash collateral in excess of $30 million, representing the proceeds of sale of three Washington, D.C. properties. Upon the Bank's motion, those proceeds became part of the Holywell and Gould estates, subject to a cash collateral order entered by the bankruptcy court on December 31, 1984. C.P. No. 303.

(c) The stock of various subsidiaries of the debtors.

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[11] The debtors appealed that judgment to the district court, and asserted in that appeal that interest was not correctly computed (Case No. 85-2263-CIV-Roettger). The district court dismissed that appeal. The Eleventh Circuit affirmed that dismissal and noted:

> [T]he debtors again attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. . . . The debtors' efforts to again require the Bank to "sweeten the pot" after this principal transaction, the sale of the property, has been completed must fail.

In re Holywell Corp., 901 F.2d at 934.

8. Thus, the Bank held collateral worth over $286 million as security for a judgment debt calculated pursuant to the Plan (under which the Bank waived a multi-million-dollar default interest differential of approximately $240 million as of the October 10, 1985 closing). *Miami Center Ltd. Partnership v. The Bank of New York*, 838 F.2d 1547, 1549 (11th Cir. 1988).

9. On a liquidation basis if the Plan had not been confirmed, the Bank might have become undersecured. The claim amount would have been over $250 million because of the default interest, while the "fire sale" value of the project would have dropped precipitously. The disclosure statement submitted by debtor Gould, for example, assigned a liquidation value of only $233.4 million to the land and buildings. C.P. No. 1188, paragraph 49(e).

10. The bankruptcy court confirmed the Bank's Plan by order entered August 8, 1985. *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985). The bankruptcy court modified that order by detailed findings of fact and conclusions of law entered after the district court remanded the debtors' appeal to the bankruptcy court for further hearings and the entry of specific findings and conclusions. *Holywell Corp.*, 59 Bankr. at 344. Those detailed findings, which were fully supported by the evidence below, included determinations that the post-petition interest in question was fully secured by the Bank's collateral. The district court affirmed the confirmation order as so amended, *Holywell Corp.*, 59 Bankr. at 352-53, and the Eleventh Circuit declined further review. *Miami Center*, 838 F.2d 1547.

11. Despite those above findings, the debtors point to two out-of-context statements which they contend

validate their argument that the Bank was undersecured. Petition, pp. 7, 9-10, and 13. First, the bankruptcy court's initial confirmation order (C.P. No. 906) included an introductory remark that described the Bank as, "the major creditor whose claim is undersecured and hopelessly in default." Because the remark was merely prefatory, there is no context from which the reader can discern: (a) whether the bankruptcy judge was commenting on a liquidation scenario or on the Bank's position under the Bank's or the debtors' proposed plans, or (b) *when* the Bank was or would be "undersecured" (i.e., on the petition date of August 22, 1984, the confirmation date of August 8, 1985 or otherwise). The bankruptcy judge's comment might have become correct in a liquidation context, because the Bank's claim would have been much greater (default interest would have been included) and the value of the project on a forced-sale basis would have been much less.

The debtors also point to statements made by counsel for the Bank during a motion for reconsideration of the Eleventh Circuit's order of remand (in Case No. 85-3225-Civ-Aronovitz) on January 10, 1986. Even from a cursory review of that transcript, it is clear that counsel for the Bank was talking about undersecurity (a) in the liquidation context (page 9, lines 18-22), (b) in the absence of a confirmed Plan rather than under the Plan (i.e., including default interest) (pages 9 and 10), and (c) as of January, 1986 rather than August or October, 1985. Bank's App. 6-8. It is evident that if confirmation of the Plan had been reversed in January, 1986 – *after* the Bank had invested $13.6 million in new cash, *after* the Bank had released its $30 million in cash collateral, and at a time when the

Bank's judgment lien (including interest at the higher default rate) had risen to $257 million – the Bank would have been undersecured. But that never occurred because the confirmation order was not reversed after the January 10, 1986 hearing. Instead the confirmation order was affirmed on March 20, 1986.

12. It is noteworthy that when it has suited the debtors to argue otherwise, they have taken a completely different position. In an attempt to minimize the amount of a supersedeas bond that the district court would require the debtors to post in order to obtain a stay pending appeal to the Eleventh Circuit, the debtors' prior counsel, who has since withdrawn, argued that, "the Bank is – and consistently admitted it is – oversecured by virtue of the current value of the hotel and office building alone." Bank's App. 11.

13. The Eleventh Circuit has noted that the Bank has performed its obligations under the Plan, and the debtors failed to obtain a stay pending appeal. As a result, the Eleventh Circuit concluded:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation.

Miami Center, 838 F.2d at 1557.

14. Based on the Eleventh Circuit's prior determination that it would not countenance the piecemeal dismantling of the Plan, the district court remanded the case to the bankruptcy court with directions to dismiss

Count III of the Liquidating Trustee's adversary complaint. 8-9a.

15. On appeal from that order, the Eleventh Circuit dismissed the debtors' appeal as moot, because "[t]his credit was part of the now substantially consummated plan of reorganization." In dismissing the debtors' appeal, the Eleventh Circuit noted that "[t]his appeal is one of a seemingly unending stream of appeals" that these debtors have filed. Although ultimately declining to do so, the court even went the additional and unusual step of considering whether to assess double costs and reasonable attorneys' fees for bringing a frivolous appeal. 2a.

ARGUMENTS AGAINST GRANTING THE WRIT

The debtors turn a blind eye to adverse precedent and the law of the case. They reargue issues that this Court has already determined, and instead focus on issues that are irrelevant to this Petition but are currently pending before this Court in yet another petition. The debtors argue, at length, that the Eleventh Circuit erred in its application of the mootness doctrine. Yet, the court below did not modify its application of the mootness doctrine, but rather reaffirmed its prior decision in this same case. It is this prior decision with which the debtors take issue, not the decision rendered below. Unfortunately, however, this Court's denial of certiorari in that case precludes the debtors from again rearguing that

issue here. *Miami Center*, 838 F.2d 1547, *cert. denied*, 488 U.S. 1046 (1988).[12]

Similarly, the debtors have attempted to focus attention away from the issues at hand by addressing the issue of their liability for federal income taxes. The courts below have consistently and unanimously ruled against the debtors on this issue. Moreover, this tax issue is now pending before this Court (Case Nos. 90-1361 and 90-1484) in another petition. Consequently, there is no legitimate basis for the debtors arguing the tax issue in this Petition.[13]

I.

LACK OF JURISDICTION

A. *The Petition is Moot*

The debtors are again clamoring for the return of something the Bank specifically bargained for in the Plan. This Court, however, previously denied the debtors' petition for writ of certiorari on the mootness issue sought to

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[12] This is not the first time that the debtors have exhibited a flagrant disregard for this Court's decisions. *See* Case No. 90-676. Principles of res judicata, collateral estoppel and the law of the case clearly bar this repeated relitigation of this issue. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979)

[13] This is particularly true in view of the debtors' failure or refusal to obey the three lower court rulings requiring them to file federal income tax returns and pay their taxes (if any such taxes are due).

be reviewed again in this Petition. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 1046 (1988).[14]

The debtors argue as they did previously that the Eleventh Circuit misapplied the mootness standard. This Court, however, denied certiorari jurisdiction after considering that argument. *Id.* The debtors' failure to obtain a stay pending review of the confirmation order rendered moot any objections to the provision in the Plan that provided for the payment of post-petition interest, because those calculations were a material element of the confirmed plan of reorganization. This Court[15] and the

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[14] This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. *See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), *cert. denied*, 110 S. Ct. 363 (1989); *Railway Labor Executives Ass'n v. Hotel Employees and Restaurant Employees Internat'l Union*, 915 F.2d (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991); *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 835 (1990); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), *cert. denied*, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), *cert. denied*, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), *cert. denied*, 488 U.S. 1046 (1989); *Columbia Gas Transmission Corp. v. F.E.R.C.*, 895 F.2d 791 (D.C. Cir.), *cert. denied*, 111 S. Ct. 278 and 111 S. Ct. 279 (1990); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

[15] This Court regularly denies review of mootness determinations because they, "require a case-by-case judgment regarding the feasibility or futility of effective relief." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). This Court articulated the mootness standard that controls the instant case nearly a century ago. *Mills v. Green*, 159 U.S. 651, 653 (1895). The rule is just as vital today.

federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated. *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law – that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan irrevocably changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

B. *The Debtors Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction*

The debtors argue that this Court has jurisdiction by virtue of the existence of a conflict between the Eleventh Circuit and several of the other courts of appeal as to the appropriate mootness standard. Notwithstanding the debtors' far reaching attempts to manufacture a basis for this Court's jurisdiction, it is apparent (as outlined in more detail below) that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 10.1. Any conflict that exists is with the Eleventh Circuit's prior opinion (838 F.2d 1547) and not with the opinion below. This Court, however, already determined

that there was no basis for jurisdiction in that case. 488 U.S. 1046.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE MOOTNESS DOCTRINE

The debtors have focused their attack on the mootness standard set forth in *Miami Center*, 838 F.2d 1547 (1988). The debtors raise the same arguments in this Petition that they raised unsuccessfully in their earlier petition. Accordingly, for the same reasons that this Court previously denied the debtors' prior petition for writ of certiorari, this Court should again deny this Petition.

The application of the mootness doctrine in a given case is particularly fact-driven. Individual decisions turn on the specific details of the confirmed plan of reorganization, the degree to which that plan has been implemented, the positions of the various parties to the proceedings, and the ability of a court to fashion "effective relief." This Court does not grant certiorari to review evidentiary matters, particularly where two courts below have concurred in the findings of facts. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (the Supreme Court does not grant certiorari to review evidence and discuss specific facts).

The Eleventh Circuit in the prior decision with which these debtors again take issue noted that the district court had made:

> [D]etailed findings that the plan was fair, feasible, and that it had been substantially consummated. And it included the finding that it was *legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo.*

Id. at 1554 (emphasis added). All of the administrative claims have been paid or reserved; secured claims have been paid in full; class 3 claims have been paid in full; undisputed claims in classes 4 through 6 have been paid in full and funds reserved for disputed claims; several disputed claims have been compromised; and there remain sufficient funds for the satisfaction, in full or in part, of the debtors' claims. *Id.* at 1552. Further, the Miami Center Project was sold over five years ago to the Bank's designee and is now under new ownership. Pursuant to the Plan, the Bank advanced millions of dollars in new cash above the mortgage balance, and the Bank released to the Liquidating Trustee over $30 million in cash collateral. That money has since been used to pay hundreds of creditors, who would not willingly disgorge the amounts received.

The prior opinion of the Eleventh Circuit and the opinion from which review is now sought are totally consistent with the long line of precedent requiring Article III Courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions. *Mills*, 159 U.S. at 653. Accordingly, this Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan of reorganization has been substantially implemented. "In this situation, the mootness doctrine

promotes an important policy of bankruptcy law – that court-appointed reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues*, 662 F.2d at 477. Moreover, the Ninth Circuit Court of Appeals in *Roberts Farms* opined that "[i]n the field of the administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." 652 F.2d at 796. The implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In light of this general rule and the underlying policy in favor of finality, the debtors (as they did previously in their petition in Case No. 87-1988) have again strained to create a conflict among the circuits or a conflict between the decision of the Eleventh Circuit and the decision of this Court. The decision below, however, is wholly consistent with the decisions of this Court and of other federal circuits. There is one harmonious theme throughout the opinions of this Court, the Eleventh Circuit, and the other federal circuits – where it is impossible to fashion a remedy that would restore the interested parties to their former positions, it is inequitable to consider the merits of the appeal.

Despite the fact that the opinion below makes no reference to Section 363(m) of the Bankruptcy Code, the debtors devoted over three pages of their argument to the applicability of this section. Petition, pp. 17-20. Likewise,

the debtors' citation of *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d. Cir. 1990) is also inapplicable. The court in *Slocum* clearly distinguished the facts in that case from the situation where *"during the pendency of the appeal,* events occurred preventing the appellate court from granting effective relief." *Id.* at 1085 (emphasis in original). The debtors inexplicably place their reliance on the dissent's citation in *Slocum* of the decision in *Miami Center,* 838 F.2d 1547. The majority, however, did not even cite the *Miami Center* decision or otherwise hint that its decision conflicted with the *Miami Center* decision. Contrary to the debtors' assertion, the Third Circuit did not decline to expand the "mootness doctrine," but merely refused to do so based on the facts in the *Slocum* case. Petition, pp. 23-24.[16]

The debtors' argument that decisions rendered by the D.C. Circuit, the Ninth Circuit, and the Sixth Circuit[17]

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[16] On the other hand, at least one district court in the Third Circuit has cited with approval the *Miami Center* case and its application of the mootness doctrine. *In re Quality Spice Corp.*, 107 Bankr. 843, 849 (D. N.J. 1989).

[17] The decisions cited by the debtors to support this contention that a conflict exists are: *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Roberts Farms*, 652 F.2d 793 (9th Cir. 1981); *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977); and *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982). The debtors also cite in their statement of the case (Petition, p. 14) the Eleventh Circuit's decision in *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir. 1985) as standing for the proposition that issues as to closing adjustments are not mooted by consummation of the sale. In this case, however, the confirmed Plan permitted no adjustment for interest; interest was fixed by a final judgment as to which all appeals (including a petition for certiorari) have been exhausted.

somehow conflict with the Eleventh Circuit is equally without merit. The debtors overlook the fact that the Eleventh Circuit in the *Miami Center* case cited the decisions in *AOV*, *Roberts Farms*, and *Combined Metals* in analyzing the factors to be considered in determining whether an appeal is moot. *Miami Center*, 838 F.2d at 1555. Moreover, this is not the first time that the debtors have argued that the decisions in *AOV* and *Combined Metals* are in conflict with the decisions of the Eleventh Circuit. They made the same argument in the *Miami Center* case, but the Bank demonstrated in its brief in opposition that these decisions as well as the *Roberts Farms* decision are consistent with the decisions of the Eleventh Circuit. *See* Bank's Brief in Opposition, pp. 16-18 (Case No. 87-1988).

The only new case upon which the debtors now rely is the Sixth Circuit's decision in *Madeline*. The court in *Madeline*, however, expressly noted that it did not even reach the issue as to whether it is possible to fashion a remedy that would restore the interested parties to their former positions. *Madeline*, 694 F.2d at 464.

This Court has acted consistently to limit and control the burgeoning workload of the federal court system. The mootness doctrine in bankruptcy cases is a significant element of that effort. Bankruptcy decisions already enjoy a second level of appellate review in the federal system. For the sake of creditors, the litigants, and the federal system, a confirmed bankruptcy plan of reorganization must not be kept under an appellate sword of Damocles for the entire duration of the appellate process. When debtors fail to post a bond as required, the parties should be allowed to consummate the plan and change positions in reliance upon the law of that case at that time.

To hold otherwise, as the debtors apparently urge, is to paralyze the ability of the bankruptcy courts to oversee and conclude reorganization cases.

CONCLUSION

For all the foregoing reasons, this Court should deny the debtors' petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May, 1991, a true and correct copy of the foregoing was mailed by first class, postage paid, U.S. mail to:

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No. 90-1551

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK AND FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

HOLLYWELL [sic] CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD,	:	Case No. 85-3225-Aronovitz-Civil
Appellants,	:	Miami, Florida Friday, January 10, 1986 9:30 a.m.
vs	:	
THE BANK OF NEW YORK,	:	
Appellees.	:	

TRANSCRIPT OF HEARING HELD BEFORE
JUDGE SIDNEY M. ARONOVITZ

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NANCY BRYANT

* * *

[p. 5] up these matters which directly involve the appellants, the appellee, and the Liquidating Trustee.

Now, since these are primarily motions from the side of the appellee, I will now recognize counsel for appellee to address those several motions first in argument.

MR. BERGAN: May I interrupt for just a moment before you do that?

THE COURT: Yes, sir.

MR. BERGAN: If the Court please, perhaps I can make this a tiny bit shorter. We filed an opposition to the

bank's motion for clarification. I think it's not really an opposition.

If what the bank is seeking in that motion is a statement by this Court that the confirmation order has not been stayed during the period of remand, we don't oppose that. If that is what they are looking for. I thought if I said that preliminarily, it might save some discussion.

THE COURT: Thank you, sir.

All right, Mr. Salter.

MR. SALTER: Your Honor, obviously, what brought us here is concern over two points. The first is a factual point. Your Honor's order recited that we paid for the Miami Center project by cancelling our lien or satisfying it, and adding to that for the cash to close money that came from the cash collateral, the sum of about $30 million that had been set [p. 6] aside pursuant to an order designating it as cash collateral, had been set aside from the sale of Mr. Gould's Washington property. So in the first instance, that was money that had been realized by the debtors, and there we had a security interest in it.

What happened, in fact, was that the bank put in new money and we disbursed the cash to close in new cash to this project, $13.6 million in cash and liabilities that was injected to accomplish that closing.

So I wanted to make very certain that the Court understood that, because there were really two actions, and that is part of our position that the sale, indeed, is irreversible. So that there were actually two things that happened.

We injected $13.6 million in new cash, and we released the money that was our cash collateral of $30 million to the Liquidating Trustee for the payment of claims, a total of $43.6 million.

I would also point out, Your Honor, that in the order of confirmation, I do understand Your Honor's concerns about the order of confirmation and the need for additional findings. We'd move to proceed forward with that with all due speed Tuesday in the Bankruptcy Court.

But in that confirmation order, there was indeed a finding – it's right in the preamble to the first page of that [p. 7] confirmation order – it says that the loans are hopelessly in default, and the bank is undersecured.

And I think the question would arise in your mind, well, how can the bank be undersecured if it's got a lien that it says is approximately $242 million, a building that it says is worth $255.6 million –

THE COURT: Where are you reading from?

MR. SALTER: Page 1 of the confirmation order.

THE COURT: Oh, of the confirmation order.

MR. SALTER: Yes, sir.

THE COURT: I thought you were referring to the order of remand.

MR. SALTER: No, sir, the confirmation order below.

THE COURT: Go ahead.

MR. SALTER: I preceded that with a statement. We do understand your concerns about it, but there is a

statement right in it that "the Bank of New York, the major creditor, whose claim is undersecured and hopelessly in default."

THE COURT: I don't think anyone questioned the fact it was in default.

MR. SALTER: Okay. I say that, Your Honor, also because of the undersecurity point, and that is critical to our position.

And this goes to the second point that Your Honor found; the finding in your order that the sale could be unwound [p. 8] and the parties restored fairly to their starting positions.

We want Your Honor to understand that the bank here is in a position of having bargained for something in its plan; that is, good title to the Miami Center project. That is in the contract. That has played a part of the plan. And we are now being told that we may not have good title, that there is some question about that.

If that is indeed the case, if the title we have is revocable in some fashion, then we have not gotten what we paid for. And the reason we ask for the emergency motion and the time, that we very much appreciate your granting the time, is our concern that our purchase money is being dissipated, and our cash collateral, which was our protection for this enormous interest accrual that was occurring right as we went along in the Bankruptcy Court, and would be going on now were we to be restored.

THE COURT: Well, let me ask you this. My recollection is that the bank maintains that the property, at

appraised value, is worth $255,700,000. and in addition to that, there is a $30 million cash collateral from the sale of the affiliated companies, Washington, D.C. real estate.

So, have you taken all that into account when you said –

MR. SALTER: Yes, sir.

THE COURT: – when you say the bank is undersecured?

[p. 9] MR. SALTER: Yes, indeed. And the problem here arises in several respects. One is, as Your Honor knows, tax liens take priority over mortgage liens, judgment liens. So, there are – Mr. Gould did not pay his taxes, and there were about $10 million of tax claims. There was extensive tax litigation by the City of Miami against the property. There are about $10 million in claims that push us back on that property.

So, in reality, it's not a $255.6 million equity or value that we are looking at. It has to be reduced by the amount or the unpaid taxes.

In addition, there are contingencies with the City of Miami. There is the River Walk, there are the development questions that must be resolved. So, there are an awful lot of costs yet to go and uncertainties relating to that property that have to be assumed. So, it is not at all safe – it's not at all safe to say that that property is, boy, just as good as gold, $255.6 million.

I would also remind Your Honor that in their liquidation analysis, attached to their plans, they said that the liquidation value, in Appendix 23 to our agreement –

they said that the liquidation value of those properties is about $233 million, the property and land.

But I think the principal point is that when you take the bank's lien from the Bankruptcy Court judgment, and you take it at its default rate, because it was in default – that [p. 10] has been admitted, and that is what is in the judgment – on October 10th, that lien would have been about $257 million – excuse me, it's 257 now. On October 10th, it would have been $249 million.

Part of the plan was to waive that default interest, and reduce the lien to the contract rate of interest, or about $242 million. We then put in new cash to close above that, $13.6 million of new money.

Now, if it is the case that the money that we put in in our cash collateral, which is the protection for our lien – if it is the case that we can be restored to that position, and divested of title to what we paid for it, we certainly want to move quickly to get the Liquidating Trustee, number one, to stop paying anyone else with our money and our cash collateral, and number two, to get back whatever he has paid to date.

In addition, we have some business decisions that I think will have to be made: Can we do anything with that property? Can we enter into a management contract? Can we enter into leases with new tenants? Can we continue to try to upgrade the hotel to get a lease by Intercontinental Hotels Corporation? Can we try to turn the project around?

That is, of course, what banks try to do when they take property back. They take it back, attempt to get it

leased out, income producing, then to dispose of it. They are not in the realty business generally; try awfully hard not to be.

[p. 11] If we can't do that, then I think we have a serious problem, and we want to take very drastic measures very quickly to try to reverse the process of seeing our money go out the door to creditors who are not before this Court.

The second part of our motion, Your Honor, is to clarify that fact and make sure that you understand this position with new money, that money did come in and has gone out, is in the hands of the Liquidating Trustee. The Liquidating Trustee can perhaps address this better, but my understanding is that about 250 checks have been cut, and that money has, in substance, been paid, an awful lot of it.

But the second point that we wanted to make, Your Honor, was to, in light of this, in light of these facts, ask Your Honor to revisit the in re Sewanee Land, Coal and Cattle Case, the Eleventh Circuit case, because of its finding that really, if the bank is a good faith purchaser, the rule of 363 M, or former rule 805 – but the principle of mootness does apply.

In light of that fact, in light of the fact that this money is out – this money is out, can't be recovered, cash collateral is dissipating ever more quickly, how can we be restored to our position? And if that is the case, then we would respectfully submit, Sewanee really requires dismissal of that case.

Final point, and if it's acceptable to counsel and to [p. 12] Your Honor, I will keep five minutes for Mr. Ziegler –

THE COURT: Go ahead. Take whatever time you reasonably need. I have the morning set aside, if need be.

MR. SALTER: I appreciate that.

THE COURT: Go ahead.

MR. SALTER: But the second point, and really our reason for asking for certification, something that is a little unusual under the interlocutory appeal rule, is that if, indeed, this case is moot, and if, indeed, Sewanee does apply – and, of course, the Eleventh Circuit, the Circuit to which we would be headed, is the court that entered that decision – then why should we not, in the interest of getting an ultimate resolution of this thing, go ahead and take that limited question up now?

I understand their opposition to it, but I don't think that the scheme of an interlocutory appeal is to in any way delay this appeal or the remand proceeding. I believe that they can continue at the same time on that limited interlocutory appeal.

What we are trying to avoid, Your Honor, very simply, is what happened to Belgium in World War I, or Seoul, Korea, during the Korean War; that is, one side comes through the hotel and takes title, the other side comes through the hotel and takes title. The employees are already uncertain about what is happening because of the newspaper clips that they saw,

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION,	)	Bk Nos. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
Appellants,	)	No. _____
v.	)	
BANK OF NEW YORK,	)	
Appellee.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO GRANT PARTIAL STAY PENDING APPEAL AND TO DETERMINE APPROPRIATE SIZE OF SUPERSEDEAS BOND

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould, Debtors in Possession (collectively referred to as the "Debtors"), file this Memorandum of Law in support of their motion for a partial stay pending appeal of the implementation or enforcement of the Amended Consolidated Plan of Reorganization, as modified by the Second Amendment to the Amended Plan (the "Plan") of the Bank of new York (the "Bank"), and for a determination that it is not necessary for Debtors to post a bond in excess of $30 million to obtain the stay. The Debtors originally moved for a stay pending appeal in the Bankruptcy Court. The Bankruptcy Court granted the motion for a stay, but required as a condition to the stay that Debtors post a bond of $140 million.

* * *

hotel and office building over the next year. *Id.* It presented no evidence to support this claim except to mention that Holywell had made $3 million in loans to the hotel, which was erroneously assumed to be for operating losses. Stay Transcript at 51, 54. Debtors explained that the $3 million loan that the hotel had was for capital improvements to the hotel, not operating losses. Stay Transcript at 95-96. See p. 6 *supra*.

The Bank added its figures up and came to $144 million, which the Bankruptcy Court essentially accepted without question since it set a bond of $140 million.

3. The Fallacies in the Bank's Calculations

It would be difficult to judge which of the figures cited by the Bank in its calculations is the most specious, in as much as each one is more fanciful than the next. One may begin by noting that $45 million of the sum – which is the total amount of undisputed claims *and* the disputed claims at full face value, plus interest – is damage that can easily be avoided, obviating the need for a bond. One of the Debtors, Holywell Corporation, is holding over $29 million in cash in bank deposits which have been frozen by the Bankruptcy Court and held as "cash collateral" for the Bank. Though this is "cash collateral" for the Bank, it is superfluous because the Bank is – and has consistently admitted it is – *over*secured by virtue of the current value of the hotel and office building alone. The Bank has no need whatsoever for the Holywell cash as security. There is no better evidence for this than the

fact that *the Bank's Plan* proposes to use *that very cash* to pay the creditor claims other than the Bank's. Nonetheless when the Debtors proposed to do the same thing – use the Holywell cash to pay the undisputed claims now and remove the trade creditors from any harm that delay might occasion – the Bank protested that the Holywell cash was its "collateral." It is noteworthy that the Bank did not – because it could not given its oversecured position and its own Plan – claim that it would be harmed by use of the Holywell cash. The $45 million dollar loss to creditors is a creation entirely of the Bank and its obstructionist position that the Holywell cash can be used to pay creditors only when and how it says but not when to do so would not harm the Bank but might provide a means by which Debtors' right to an appeal and undisputed claim holders' interests can be protected.[18]

The $61 million claim for deterioration in the value of the Miami Center is equally without foundation. First of all, the assertion flies in the face of the Bank's own Plan. It strains credulity for the Bank to argue that it is offering to pay $255.6 million – $16 million more than its claim – for a hotel and office complex that it has no immediate prospects of selling and that it believes will be worth only $194.6 million in a year ($255.6 million less $61 million). The entire board of directors of the Bank of New York

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[18] The Bank has consistently in the bankruptcy case used a not very subtle form of bullying on the Bankruptcy Court, and it repeated the tactic in the hearing on a stay. The Bank made it clear that if the Plan could not go forward and the Miami Center was not conveyed promptly to the Bank – in other words if the Bankruptcy Court granted a meaningful stay – the Bank would withdraw its Plan. Stay Transcript at 43-44.

would be sacked – and rightfully so – if that is really what the Bank expects to be buying. And indeed experience shows that the Bank's judgment is much more prudent than that.

The Debtors commissioned two appraisals of the Miami Center, one as of August, 1983 and another as of October, 1984. Both were done by McCune & Company. The August, 1983 appraisal for the land, hotel, Podium, parking garage, office building and FF&E was $285 million. The October, 1984 appraisal for the same items was $275 million. This is an annual rate of decline for the entire Miami Center of approximately $8.5 million. The Bank offered nothing that would support a conclusion that conditions in 1985 and 1986 will be so much different from those that prevailed in 1983 and 1984.

It is far more likely that the Bank is paying $255.6 million because it expects to recoup its claim, and indeed profit in the bargain. The absurdity of the Bank's calculations are best illustrated by two critical elements of its counsel's analysis. With absolutely no factual basis except the Bankruptcy Court's "judical notice" of the state of the Miami office market, the Bank baldly guessed that the office building would decline 20% in value over the next year. It then applied this percentage against a value of $240 million for the office building, which is $128.2 million more than the Bank's own appraisal of the office building. Though the Bank claimed this was "Mr. Gould's appraisal" of the office building, Stay Transcript at 55, it was nothing of the sort. There is no appraisal in the record that gives such a value to the office building. The $240 million figure is close to the number given by Debtors' appraiser, McCune & Company, in its October,

1984 appraisal, for the office building *and the hotel, the parking garage, and the restaurant and shopping mall Podium* together. In other words, the Bank was double-counting when it added $48 million to $13 million. This is again a good example of the looseness and lack of concern for accuracy with which the Bank tossed off valuation and damage estimates.

It is respectfully suggested that if the Bankruptcy Court gave such credence in this instance to the Bank's valuation of the office building and hotel – which total $305 million – it should have rejected as grossly inadequate the Bank's Plan which proposes to buy the office building *and* the hotel *and* all the furniture, fixtures and equipment in both *and* the underlying land for only $255.6 million, or $49 million less than the figure the Bank used for the hotel and office building alone in deriving its "damage" calculations.

4. The Actual Reasonably Anticipated Losses

It is respectfully submitted that if the Bankruptcy Court had returned to solid ground after the fanciful flights in the Bank's argument, it could have fashioned a stay that would protect the Bank, protect non-Bank claimants, and be conditioned on a bond within the means of the Debtors.

* * *